

Court of Appeals, State of Michigan

ORDER

James Lewis v Bridgman Public Schools

Docket No. 261349

LC No. 04-000008

Deborah A. Servitto
Presiding Judge

E. Thomas Fitzgerald

Michael J. Talbot
Judges

On the Court's own motion, the Court's majority opinion and single concurring opinion of June 17, 2008, are VACATED. With this order, the Court today issues a majority opinion and two concurring opinions in this matter.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 01 2008

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

JAMES LEWIS,

Petitioner-Appellee,

v

BRIDGMAN PUBLIC SCHOOLS,

Respondent-Appellant.

FOR PUBLICATION

June 17, 2008

9:00 a.m.

No. 261349

State Tenure Commission

LC No. 04-000008

ON REMAND

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

FITZGERALD, J.

This teacher tenure case returns to this Court on remand from our Supreme Court. Respondent Bridgman Public Schools (the school district) appeals by leave granted from the State Tenure Commission's February 18, 2005, decision and order that reduced petitioner James Lewis' discipline from discharge, as recommended by the hearing officer, to a suspension without pay or benefits through the end of the 2005-2006 school year. On May 8, 2007, a majority of this panel reversed, concluding that the tenure commission had applied an incorrect standard of review.¹ *Lewis v Bridgman Public Schools*, 275 Mich App 435; 737 NW2d 824 (2007), rev'd 480 Mich 1000 (2007).

Lewis sought leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed this Court's decision² and remanded "for consideration of whether the Commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record." *Lewis v Bridgman Public Schools*, 480 Mich 1000; 742 NW2d 352 (2007).

The background facts were set forth in this Court's previous opinion:

¹ Judge Fitzgerald dissented, opining that the tenure commission's application of a de novo standard of review was proper.

² The Supreme Court reversed this Court's judgment "because the teacher tenure act, MCL 38.101 *et seq.* does not require the State Tenure Commission to apply a 'clear error,' rather than a 'de novo' standard of review to its consideration of the preliminary decisions of administrative law judges."

This case arose when Lewis, a high school teacher with 12 years of teaching experience, presented his 18-year-old male teaching assistant, a student at the high school, with an air gun as a Christmas gift. Presentation of the gift was made while on school property. The air gun, described as an accurate replica of a Ruger semi-automatic handgun, along with ammunition, was presented to the teaching assistant in the presence of other students. The air gun discharges plastic pellets and has a muzzle velocity of over 250 feet per second, which is comparable to other types of pellet guns and BB rifles. Although the box containing the air gun indicated specific warnings, particularly regarding the need for eye protection, Lewis did not provide such protective gear as part of the student's gift. Lewis did not instruct the student on safe use of the air gun or any dangers regarding its use. In addition, Lewis failed to solicit or secure the advice or permission of school administrators or the student's parents before the selection and presentation of the gift.

The student was uncomfortable with accepting this gift and feared expulsion for having the air gun on school property. This concern was legitimate, as possession of the gun was violative of School District Policy No. 5610.01, which states in relevant part:

In compliance with State and Federal law, the Board shall expel any student who possesses a dangerous weapon in a weapon-free school zone. . . .

* * *

For purposes of this Policy, a dangerous weapon is defined as "a firearm, dagger, dirk, stiletto, knife with a blade over three (3) inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles" or other devices designed to or likely to inflict bodily harm, including, but not limited to, air guns and explosive devices.

The air gun remained in an unlocked storage room in Lewis's classroom for several weeks before the student took the air gun home. When the student informed his parents of the gift, they complained to the school, which resulted in the school district's decision to proceed with charges for Lewis's discharge. [Lewis, *supra*, 275 Mich App at 437-438.]

Lewis was charged with abrogating his responsibility to perform his duties in a professional manner and to act as an appropriate example and role model for students. He was also charged with insubordination for violating the school district's staff conduct and ethics policy, which prohibits staff members from possessing or storing weapons on school property. The policy defines "weapon" to include "air and gas-powered guns."

At the tenure hearing, the school district supported its request for Lewis' discharge with evidence of several prior incidents exemplifying Lewis' poor judgment. These incidents included (1) a letter of reprimand as a result of a 1993 remark to a student high jumper that he

should arch his back as if “there is a vagina in the sky,” (2) a 1993 incident involving sleeping in the school building, (3) arriving at work more than one hour late on one occasion, (4) making a sexual comment to a female student, (5) bringing his dog onto school property, resulting in the dog biting a student, (6) allowing his dogs to run loose in the school building during Christmas break, (7) a letter of concern as a result of a comment to a female student that she did not know who her father was, (8) a two-day suspension without pay in 2002 after he told his class that he had been to a condom shop “but they didn’t have [his] size,” and (9) a letter of concern for inappropriate physical contact with a female student after he approached the student from behind, wrapped his arms around her mid-section, and lifted her off the floor. In March 2003, Lewis was placed on a two-month individualized development plan, which he successfully completed.

Evidence of Lewis’ many positive contributions to the school was also presented at the hearing. He served as class advisor on two occasions, started an environmental science stewardship program and a recycling program, served on the school’s curriculum committees, served as science club advisor, coached the Science Olympiad team, led students on community service events, and organized science-related field trips. Lewis has coached various middle school sports teams, developed the middle school cross-county program, supervised the intramural sports program, volunteered with the high school sports program, and participated in summer sports programs. His fellow teachers and coaches described him as positive, upbeat, good with students, an effective and outstanding teacher, and a passionate and effective coach. Two of Lewis’ former students testified that he was an effective teacher.

The hearing officer issued a 28-page preliminary decision and order, finding that the school district had proven reasonable and just cause to terminate Lewis’ employment. The hearing officer found that Lewis “showed a serious lack of professional judgment” in giving the air gun to the student, and that the air gun was “not a mere toy.” The hearing officer found that Lewis had ample opportunity to reflect upon his choice of gift, that he disregarded warnings on the gun box, that he did not provide the student with any protective eye gear, that he did not seek permission from the student’s parents before giving such a gift, that he knew nothing of the student’s family, including whether there were young children living in the home, and that the gift placed the student at risk of expulsion. The hearing officer further found that the realistic appearance of the air gun had the potential to lead to “an extremely dangerous law enforcement response.” After applying the discipline factors in *Szopo v Richmond Comm Schools Bd of Ed*, State Tenure Commission Docket No. 93-60 (1994), the hearing officer determined that discharge was appropriate on the basis of the following: (1) Lewis’ behavior was planned and intentional, (2) the incident involved a realistic replica of a semi-automatic weapon, (3) the incident placed the school community and the student at risk, (4) the incident caused considerable anxiety to the student and his family, and (5) Lewis’ prior lapses of judgment. The hearing officer explained his reasons for recommending Lewis’ discharge:

There was undisputed testimony of [Lewis’s] significant contributions to the Bridgman school community, and I cannot conclude from the evidence that his motive in this instance was improper. Nevertheless, given [Lewis’s] history of significant lapses in judgment, the egregious violation of professional decorum in his choice of [the student’s] gift, and the school district’s legitimate concern to maintain a safe environment free of weapons, including replica weapons, I am

persuaded that discharge is the appropriate remedy in this case. I find that this is the sole remedy which both reflects the seriousness of appellant's conduct and serves as a clear message that such conduct will not be tolerated.

Both parties filed exceptions to the hearing officer's preliminary decision and order.

The tenure commission issued a 32-page decision and order, rejecting all but one of the parties' exceptions. The tenure commission disagreed with the hearing officer's recommendation of discharge, and instead imposed a suspension without pay until the end of the 2005-2006 school year. The tenure commission affirmed the hearing officer's conclusions in all other respects, stating that the hearing officer's findings "clearly support his determination that [Lewis] demonstrated a serious lack of professional judgment" given his failure to consider "possible ramifications" of giving the gift to the student while on school property, particularly given the "close resemblance" of the air gun "to an actual semi-automatic pistol." The tenure commission applied the *Szopo* factors, and was "left with the definite conclusion that appellant's misconduct was both egregious and a clear violation of the conduct expected of a teaching professional." The tenure commission was also "troubled" by Lewis' lack of appreciation for the seriousness of his misconduct, and his history of "less serious lapses of judgment," which went uncorrected despite interventions by the school district.

However, in support of its decision to reduce the penalty from discharge to suspension, the tenure commission cited a lack of evidence of an "improper motive" by Lewis, and "undisputed evidence" of Lewis' "significant contributions to the District" as a teacher. The tenure commission reasoned:

[W]e cannot ignore the lengthy and positive contribution to teaching appellant has made. While it is clear that a serious penalty recognizing the gravity of appellant's misconduct and acting to deter future improper behavior is in order, we find discharge is too severe for this particular teacher based on these circumstances. Further, a reduction in the level of discipline more fairly reflects the principle of progressive discipline as appellant's only previous formal discipline was a two-day unpaid suspension.

Thus, after considering all of the facts underlying appellant's misconduct, previous Commission cases where recommended discharges were reduced to lengthy penalties, and appellant's significant contributions as a teacher, we believe an unpaid suspension until the end of the 2005/2006 school year is appropriate. The substantial length of this penalty recognizes the seriousness of appellant's misconduct and provides a strong message to appellant to exercise good judgment in his future teaching career.

The school district argues that the tenure commission's reduction in discipline was unsupported by competent, material, and substantial evidence on the whole record. A final decision of the tenure commission must be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 24.306(1)(d); *Beebee v Haslett Pub Schools (After Remand)*, 406 Mich 224, 231; 278 NW2d 37 (1979). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is

more than a scintilla but may be substantially less than a preponderance.” *Parker v Byron Center Public Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). This Court gives due deference to the expertise of an administrative agency, and will not “invade the province of exclusive administrative fact-finding by displacing an agency’s choice between two reasonably differing views.” *Widdoes v Detroit Public Schools*, 218 Mich App 282, 286; 553 NW2d 688 (1996). Review involves a degree of qualitative and quantitative evaluation of all the evidence that the tenure commission considered, rather than just those portions of the record supporting the tenure commission’s decision. *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986).

Tenured teachers may be discharged or demoted only for reasonable and just cause. MCL 38.101; *Satterfield v Grand Rapids Public Schools Bd of Ed*, 219 Mich App 435, 437; 556 NW2d 888 (1996). The school board bears the burden of establishing reasonable and just cause, which can be shown only by significant evidence proving that the teacher is unfit to teach. *Parker v Bd of Ed of Byron Center Public Schools*, 229 Mich App 565, 574; 582 NW2d 859 (1998); *Benton Harbor Area Schools Bd of Ed v Wolff*, 139 Mich App 148, 154; 361 NW2d 750 (1984). The tenure commission has authority to “adopt, modify, or reverse the preliminary decision and order” of the hearing officer. MCL 38.104(5)(m).

The Legislature has vested the tenure commission with decision-making authority regarding an appropriate penalty for teacher misconduct. In *Lakeshore Bd of Ed v Grindstaff (After Second Remand)*, 436 Mich 339; 461 NW2d 651 (1990), our Supreme Court held that the tenure commission has the authority under MCL 38.101 to reduce the level of discipline of a tenured teacher imposed by a school board from discharge to suspension where it finds that the charged misconduct, while proven, was not reasonable and just cause for discharge.

The tenure commission’s finding of reasonable and just cause to reduce Lewis’s discipline from discharge to a lengthy suspension without pay was not arbitrary or capricious, or an abuse of discretion, and it was supported by competent, material, and substantial evidence on the whole record. The tenure commission differed with the hearing officer’s conclusions only with regard to the appropriate level of discipline, and it gave several reasons for its decision to modify the hearing officer’s recommendation and impose a less severe penalty.

Lewis’s involvement in the community and his teaching record militated against termination. Teachers and former students praised Lewis’s teaching ability, and described him as an exceptional teacher and coach. The tenure commission observed that Lewis’s record “show[ed] numerous examples of a teacher who went well above and beyond what was required.” Although the hearing officer found that several of the factors articulated in *Szopo v Richmond Comm Schools Bd of Ed* (93-60) supported discharge, other factors weighed in Lewis’s favor. Lewis’s motive in giving the air gun to the student was not malicious, no actual harm resulted, and Lewis had no previous violations of the school’s weapons policy. Lewis took responsibility for his actions and stated that he would not repeat the misconduct in the future. *Szopo, supra*.

Additionally, the tenure commission’s application of progressive discipline principles favored a more lenient penalty than discharge. Although Lewis’s record showed that he had exercised poor judgment on numerous occasions, he received only reprimands for all but one of the previous incidents. The only formal discipline imposed was a two-day suspension. This is

Lewis's second offense, for which the tenure commission suspended him for more than one year. This escalation from the first-offense, two-day suspension was reasonable.

The tenure commission acted within its authority in concluding that Lewis's misconduct did not constitute reasonable and just cause for discharge, and reducing the penalty to a lengthy suspension. *Lakeshore, supra*. The evidence militating against discharge was undisputed, and it was competent and substantial. All of the tenure commission's reasons for imposing a punishment short of termination are adequately grounded in the record.

Affirmed.

/s/ E. Thomas Fitzgerald